



Commonwealth of Virginia
Virginia Information Technologies Agency

DATA DESTRUCTION FOR SURPLUS COMPUTER EQUIPMENT

Optional Use Contract

Date: October 5, 2004

Contract #: VA-040917-DYNT

Authorized User: State Agencies, Institutions and Public Bodies as defined in the Virginia Public Procurement Act (VPPA)

Contractor: DynTek Services, Inc.
501 East Franklin Street
Suite 518
Richmond, VA 23219

FIN: 13-4067484

Contact Person: Andrew Miller
Phone: 804-521-4163
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Term: September 30, 2004 – September 29, 2007

Payment: Net 30 days

For Additional Information, Please Contact:

Technical Information:

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NOTES: For updates, please visit our Website at: <http://www.asd.virginia.gov>

Prior review and approval by the **VIRGINIA INFORMATION TECHNOLOGIES AGENCY (VITA)** for purchases in excess of \$100,000.00 is required for State Agencies and Institutions only.

CONTRACT CHANGE LOG

[illegible]

**MASTER AGREEMENT
CONTRACT VA-040917-DYNT
BETWEEN
THE COMMONWEALTH OF VIRGINIA
and DYNTEK SERVICES, INC.**

SCOPE OF CONTRACT

This is an agreement (the "Agreement") between the Commonwealth of Virginia, Virginia Information Technologies Agency and Dyntek Services, Inc. (the "Contractor"), having its principal Commonwealth place of business at 501 E. Franklin St., Richmond, Va. 23219. This Agreement contains the Contractual Terms and Conditions by which the Commonwealth and the Contractor will establish a Master Contract pursuant to the Commonwealth's Request For Proposals #2004-15 (the "RFP") for Secure Data Destruction for Surplus Computer Equipment, and the Contractor's Proposal, in response thereto.

The Contractor shall provide secure data destruction services that meet or exceed the Commonwealth's Information Technology Resource Management Standards as current at the time of any service order. This is also referred to as "cleaning" or "wiping". Additionally, the Contractor shall provide the services outlined herein for the handling of surplus electronic equipment that has been "cleaned" by the Contractor, which may include resale, donations to schools, shipment to the State's surplus property warehouse, or recycling. These services shall be available to all Authorized Users, who are defined as any public body as defined by §2.2-4301 (5) of the Code of Virginia and all other public bodies as referenced in §2.2-4304 of the Code of Virginia.

INTERPRETATION OF AGREEMENT

The documents comprising this Agreement, and their order of precedence in case of conflict are:

- (1) This document, consisting of attached Terms and Conditions.
- (2) Contractor's Administrative Procedures Manual (APM)
- (3) Contractor's proposal dated March 24, 2004.

The foregoing documents represent the complete and final agreement of the parties with respect to the subject matter of this agreement.

If any term of condition of this Agreement is found to be illegal or unenforceable, it shall be severed, and the validity of the remaining terms and conditions shall not be affected.

Nothing in this agreement shall be construed as an express or implied waiver of the Commonwealth's sovereign or Eleventh Amendment immunity, or as a pledge of its full faith and credit.

EXCLUSIVITY OF TERMS AND CONDITIONS

The Commonwealth will not sign or execute any additional contract, license or other agreement, including shrink-wrap software, containing contractual terms and conditions as a result of this procurement. Any documents signed by persons other than the Contract Administrator, VITA (Virginia Information Technologies Agency), or designee shall have no validity and the attached Terms and conditions shall supersede all such arrangements.

APPLICABLE LAWS AND COURTS

This solicitation and any resulting Contract shall be governed in all respects by the laws of the Commonwealth of Virginia and any litigation with respect thereto shall be brought in the courts of the Commonwealth. The Contractor shall comply with all applicable federal, state and local laws, rules and regulations.

ANTI-DISCRIMINATION

By submitting their proposal, Offeror certifies to the Commonwealth that they will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Contracting Act of 1975, as amended, where applicable, the Virginians With Disabilities Act, the Americans With Disabilities Act and §2.2-4311 of the Virginia Public Procurement Act. If the award is made to a faith-based organization, the organization shall not discriminate against any recipient of goods, services, or disbursements made pursuant to the Contract on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and shall be subject to the same rules as other organizations that Contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the public body. (Code of Virginia, § 2.2-4343.1E).

In every Contract over \$10,000 the provisions in a. and b. below apply:

- a. During the performance of this Contract, the Contractor agrees as follows:
 - 1) The Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the Contractor. The Contractor agrees to post in conspicuous places, available to employees and

applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

- 2) The Contractor, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, will state that such Contractor is an equal opportunity employer.
 - 3) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for meeting these requirements.
- b. The Contractor will include the provisions of 1. above in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

IMMIGRATION REFORM AND CONTROL ACT OF 1986

By submitting their proposal, Offeror certifies that they do not and will not during the performance of this Contract employ illegal alien workers or otherwise violate the provisions of the federal Immigration Reform and Control Act of 1986.

DEBARMENT STATUS

By submitting their proposal, Offeror certifies that they are not currently debarred by the Commonwealth of Virginia from submitting bids on Contracts for the type of goods and/or services covered by this solicitation, nor are they an agent of any person or entity that is currently so debarred.

ANTITRUST

By entering into a Contract, the Contractor conveys, sells, assigns, and transfers to the Commonwealth of Virginia all rights, title and interest in and to all causes of action it may now have or hereafter acquire under the antitrust laws of the United States and the Commonwealth of Virginia, relating to the particular goods or services purchased or acquired by the Commonwealth of Virginia under said Contract.

BILLING

DynTek shall bill the User directly for services rendered at the end of each month. The User will receive a statement listing all devices collected and reallocated during the 30 day period. If, after 60 days, DynTek is unable to identify a market for the device, an additional recycling fee will be incurred to assure disposal that meets Commonwealth Department of Environmental Quality and Federal Environmental Protection Agency guidelines. Further information is available in the DynTek Surplus APM.

PAYMENT

1. To Prime Contractor:

- a. Invoices for items ordered, delivered and accepted shall be submitted by the Contractor directly to the payment address shown on the purchase order/Contract. All invoices shall show the state Contract number and/or purchase order number; project number, or the federal employer identification number (for proprietorships, partnerships, and corporations).
- b. Any payment terms requiring payment in less than 30 days will be regarded as requiring payment 30 days after invoice or delivery, whichever occurs last. This shall not affect offers of discounts for payment in less than 30 days, however.
- c. All goods or services provided under this Contract or purchase order, that are to be paid for with public funds, shall be billed by the Contractor at the Contract price, regardless of which public agency is being billed.
- d. The following shall be deemed to be the date of payment: the date of postmark in all cases where payment is made by mail, or the date of offset when offset proceedings have been instituted as authorized under the Virginia Debt Collection Act.
- e. Unreasonable Charges: Under certain emergency procurements and for most time and material purchases, final job costs cannot be accurately determined at the time orders are placed. In such cases, Contractors should be put on notice that final payment in full is contingent on a determination of reasonableness with respect to all invoiced charges. Charges that appear to be unreasonable will be researched and challenged, and that portion of the invoice held in abeyance until a settlement can be reached. Upon determining that invoiced charges are not reasonable, the Commonwealth shall promptly notify the Contractor, in writing, as to those charges which it considers unreasonable and the basis for the determination. A Contractor may not institute legal action unless a settlement cannot be reached within thirty (30) days of notification. The provisions of this section do not relieve an agency of its prompt payment obligations with respect to those charges that are not in dispute (Code of Virginia, § 2.2-4363).

2. To Subcontractors:

- a. A Contractor awarded a Contract under this solicitation is hereby obligated:
 1. To pay the subcontractor(s) within seven (7) days of the Contractor's receipt of payment from the Commonwealth for the proportionate share of the payment received for work performed by the subcontractor(s) under the Contract; or
 2. To notify the agency and the subcontractor(s), in writing, of the Contractor's intention to withhold payment and the reason.
- b. The Contractor is obligated to pay the subcontractor(s) interest at the rate of one percent per month (unless otherwise provided under the terms of the Contract) on all amounts owed by the Contractor that remain unpaid seven (7) days following receipt of payment from the Commonwealth, except for amounts withheld as stated in (2) above. The date of mailing of any payment by U. S. Mail is deemed to be payment to the addressee. These provisions apply to each sub-tier Contractor performing under the primary Contract. A Contractor's obligation to pay an interest charge to a subcontractor may not be construed to be an obligation of the Commonwealth.

MODIFICATIONS TO THE CONTRACT

This contract maybe modified in accordance with §2.2-4309 of the Code of Virginia. Such modifications may only be made by the representatives noted below, or by their designees. No modifications to this contract shall be effective unless it is in writing and signed by the duly authorized representative of both parties. No term or provision hereof shall be deemed waived and no breach excused unless such waiver or consent to breach is in writing. For purposes of the contract, the only authorized representative for the Commonwealth shall be the Contract Administrator, VITA, or designee.

DEFAULT

In case of failure to deliver services in accordance with the Contract terms and conditions, the Commonwealth, after due oral or written notice, may procure them from other sources and hold the Contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies that the Commonwealth may have. Contractor shall not be liable for any excess cost if the failure to

perform arises out of any act of war, order of legal authority, strikes, act of God, or other unavoidable causes not attributed to their fault or negligence.

BREACH

The Contractor shall be deemed in breach of this Agreement if the Contractor does not comply with the terms and conditions of the Master Contract and/or the service levels as described in the Procedures Manual, or if the contractor does not comply with a corrective action plan as issued in a written warning from the Commonwealth, or a "show cause" notice, within 30 calendar days of issuance of same.

The Contractor shall not be in breach of this Agreement if its default was due to causes beyond the reasonable control of, and occurred without any fault or negligence on the part of, both the Contractor and its subcontractors. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Commonwealth in either its sovereign or Contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.

In the event of breach, in addition to any other remedies provided by law, the Commonwealth may cancel its obligations with respect to any or all unaccepted Services. In no event shall any failure by the Commonwealth to exercise any remedy available to it be construed as a waiver of or consent to any breach.

INSURANCE

By signing and submitting a proposal under this solicitation, the Offeror certifies that if awarded a Contract, it will have the following insurance coverages at the time the Contract is awarded. For construction Contracts, if any subcontractors are involved, the subcontractor will have workers' compensation insurance in accordance with §§ 2.2-4332 and 65.2-800 et seq. of the Code of Virginia. The Offeror further certifies that the Contractor and any subcontractors will maintain these insurance coverages during the entire term of the Contract and that all insurance coverages will be provided by insurance companies authorized to sell insurance in Virginia by the Virginia State Corporation Commission.

INSURANCE COVERAGES AND LIMITS REQUIRED:

1. Worker's Compensation – Statutory requirements and benefits.
2. Employers Liability - \$100,000.
3. Commercial General Liability - \$500,000 combined single limit. Commercial General Liability is to include Premises/Operations

Liability, Products and Completed Operations Coverage, and Independent Contractor's Liability or Owner's and Contractor's Protective Liability. The Commonwealth of Virginia must be named as an additional insured when requiring a Contractor to obtain Commercial General Liability coverage.

DRUG-FREE WORKPLACE

During the performance of this Contract, the Contractor agrees to (i) provide a drug-free workplace for the Contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the Contractor that the Contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific Contract awarded to a Contractor, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the Contract.

NONDISCRIMINATION OF CONTRACTORS

An Offeror or Contractor shall not be discriminated against in the solicitation or award of this Contract because of race, religion, color, sex, national origin, age, or disability or against faith-based organizations. If the award of this Contract is made to a faith-based organization and an individual, who applies for or receives goods, services, or disbursements provided pursuant to this Contract objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

eVA BUSINESS-TO-GOVERNMENT VENDOR REGISTRATION

The eVA Internet electronic procurement solution, web site portal www.eva.state.va.us, streamlines and automates government purchasing

activities in the Commonwealth. The portal is the gateway for vendors to conduct business with state agencies and public bodies.

All vendors desiring to provide goods and/or services to the Commonwealth shall participate in the eVA Internet e-procurement solution either through the eVA Basic Vendor Registration Service or eVA Premium Vendor Registration Service, and complete the Ariba Commerce Services Network registration.

- a. eVA Basic Vendor Registration Service: \$25 Annual Fee plus a transaction Fee of 1% per order received. The maximum transaction fee is \$500 per order. eVA Basic Vendor Registration Service includes electronic order receipt, vendor catalog posting, on-line registration, and electronic bidding, as they become available.
- b. eVA Premium Vendor Registration Service: \$200 Annual Fee plus a Transaction Fee of 1% per order received. The maximum transaction fee is \$500 per order. eVA Premium Vendor Registration Service includes all benefits of the eVA Basic Vendor Registration Service plus automatic email or fax notification of solicitations and amendments, and ability to research historical procurement data, as they become available.
- c. Ariba Commerce Services Network Registration. The Ariba Commerce Services Network (ACSN) registration is required and provides the tool used to transmit information electronically between state agencies and vendors. There is no additional fee for this service.

eVA BUSINESS-TO-GOVERNMENT CONTRACTS

The eVA Internet electronic procurement solution, web site portal www.eva.state.va.us, streamlines and automates government purchasing activities in the Commonwealth. The portal is the gateway for vendors to conduct business with state agencies and public bodies.

Vendors desiring to provide goods and/or services to the Commonwealth shall participate in the eVA Internet e-procurement solution and agree to comply with the following:

- a. Submit a fully executed American Management Systems, Inc., (AMS) Trading Partner Agreement, a copy of which can be accessed and downloaded from www.eva.state.va.us. AMS is the Commonwealth's service provider to implement and host the eVA e-procurement solution.

- b. Provide an electronic catalog (price list) for items awarded under a term contract. The format of this electronic catalog shall conform to the eVA Catalog Interchange Format (CIF) Specification that can be accessed and downloaded from www.eva.state.va.us.
- c. In some cases, the contract does not lend itself to the development of a catalog and price list. In this case, the Contractor must provide an index page describing the contractor's products, services and contact information. In this case, a TPS is not required.

INDUSTRIAL FUNDING ADJUSTMENT

The Contractor must pay VITA, an Industrial Funding Adjustment (IFA). The Contractor must remit the IFA within 30 days after the end of each quarterly reporting period as established in the clause entitled "Contractor's Report of Sales". The IFA equals two percent (2%) of the total quarterly sales reported. Contractor shall remit the IFA together with a copy of the Contractor's Report of Sales as delineated in the paragraph herein entitled "Contractor's Report of Sales". The IFA reimburses the Commonwealth and defrays the costs for IT procurement and the administration of the subsequent awards. The IFA amount due must be paid by check with identification of "Contract number", "report amounts", and "report period", on either the check stub or other remittance material. VITA may at its discretion, agree to an electronic funds transfer, in lieu of a check, however in the absence of an express written agreement from VITA that validates agreement, then the payment shall be made by check as described herein made payable to the Controller, VITA.

If the full amount of the IFA is not paid within thirty (30) calendar days after the end of the applicable reporting period, it shall constitute a Contract debt to the Commonwealth of Virginia, and the State may exercise all rights and remedies available under law, including debt offset. Failure to submit sales reports, falsification of sales reports, and or failure to pay the IFA in a timely manner may result in termination or cancellation of this Contract. Willful failure or refusal to furnish the required reports, falsification of sales reports, or failure to make timely payment of the IFA constitutes sufficient cause for terminating this Contract for default.

It is the intent of the Commonwealth to capture 2% of all sales to the Commonwealth under this Agreement.

CONTRACT TERM

The initial contract term will be for a three (3) year period and may be renewed by the Commonwealth for three (3) successive one-year periods under the terms and conditions of the original contract. Written notice of the Commonwealth's intention to renew will be given approximately 60 days prior to the expiration date of each contract period. All Orders and related documents shall survive the period of performance stated in this section until such time as all Orders (executed prior to the expiration date of the Contract) have been completely performed.

TERMINATION FOR CONVENIENCE

The Commonwealth may terminate this Contract in whole or in part for convenience at any time by submitting notice to the Contractor in writing, sixty (60) days prior to the date of Termination. The Commonwealth shall be obligated for all outstanding Orders, according to the Contract, subsequent to this Termination. The Commonwealth shall not be obligated for any other costs in the event of Termination for convenience.

CONTRACTUAL DISPUTES

In accordance with Section 2.2-4363 of the *Code of Virginia*, Contractual claims, whether for money or other relief, shall be submitted in writing to the Commonwealth no later than sixty (60) days after final payment; however, written notice of the Contractor's intention to file such claim must be given to such purchasing agency at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The Commonwealth shall render a final decision in writing within thirty (30) days after its receipt of the Contractor's written claim.

The Contractor may not invoke any available administrative procedure under Section 2.2-4365 of the *Code of Virginia* nor institute legal action prior to receipt of the Commonwealth decision on the claim, unless that agency fails to render its decision within thirty (30) days. The decision of the purchasing agency shall be final and conclusive unless the Contractor, within six (6) months of the date of the final decision on the claim, invokes appropriate action under Section 2.2-4364, *Code of Virginia* or the administrative procedure authorized by Section 2.2-4365, *Code of Virginia*.

In the event of any breach by the Commonwealth, Contractor's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this section. In no event shall Contractor's remedies include the right to terminate any license or support services hereunder.

PATENT/COPYRIGHT PROTECTION

Contractor, at its own expense, shall defend any suit brought against the Commonwealth for the infringement of patents, copyrights or trade secrets enforceable in the United States if the claim of infringement is alleged to relate to or arise from the Contractor's or Commonwealth's use of any equipment, software, materials or information prepared, developed or delivered in connection with performance of this Agreement. In such suit, Contractor shall indemnify the Commonwealth, its agents, officers and employees for any loss, liability or expense incurred as a result of such suit.

The purchasing agency shall notify the Contractor of such suit within a reasonable time after learning of it and shall give the Contractor the full right and opportunity to conduct the defense of the suit, subject however to the requirements of Section 2.2-507, Section 2.2-510 of the *Code of Virginia* or any successor statute. If principles of governmental or public law are involved, the Commonwealth may, at its option and expense, participate in the defense of the suit.

The Contractor shall not be required to indemnify the Commonwealth for liability arising solely out of the Commonwealth's own specifications or design or solely from the combination of equipment or software furnished hereunder with any equipment or software not supplied by the Contractor.

If, any Product or Service becomes, or in the Contractor's opinion, is likely to become, the subject of a claim of infringement, Contractor may, at its option, provide non-infringing substitutes that are satisfactory to the Commonwealth, or at Contractor's option and expense, may obtain the right for the Commonwealth to continue the use of such Product or Service.

If the use of such equipment or software by the Commonwealth is prevented by permanent injunction or by Contractor's failure to procure the right for the Commonwealth to continue using the software, the Contractor agrees to take back the infringing equipment, software, materials or information and refund the total amount the Commonwealth has paid Contractor under this Agreement, less one half (1/2%) percent of the total paid for each month of use by the Commonwealth. This obligation is in addition to the obligations cited in the first four subparagraphs above.

CONFIDENTIALITY OF INFORMATION

Contractor agrees to observe complete confidentiality with respect to all aspects of any confidential information, proprietary data and/or trade secrets and any parts thereof, whether such contents are the Users or other manufacturer, contractor or distributor whereby Contractor or any Contractor's personnel may gain access while engaged by the User or while on authorized User's premises. Revealing, copying or using in any manner whatsoever any such contents which have not been authorized by the User are strictly prohibited. The restrictions herein shall survive the termination of this agreement for any reason and shall continue in full force and effect and shall be binding upon the Contractor, his agents, employees, successors, assigns, subcontractors or any party claiming an interest in this Agreement on behalf of or under the rights of Contractor following any termination. Contractor shall advise all Contractors' agents, employees, successors, assigns and subcontractors which are engaged by the User of the restrictions, present and continuing, set forth herein. Contractor shall defend and incur all costs, if any, for actions which arise as a result of non-compliance by Contractor, his agents, employees, successors, assigns and subcontractors regarding the restrictions herein.

PRIME CONTRACTOR RESPONSIBILITIES

The Contractor shall be responsible for completely supervising and directing the work under this Agreement and all subcontractors that he may utilize, using his best skill and attention. Subcontractors who perform work under this contract shall be responsible to the prime contractor. The Contractor agrees that he is fully responsible for the acts and omissions of his subcontractors and of persons employed by them as he is for the acts and omissions of his own employees.

CONTRACTOR RECORDS

All Contractual books, records and other documents related to matters under this Contract shall be made available by Contractor to the State and its designated agents for a period of three (3) years after final payment for purposes of audit and examination.

Contractual records are hereby further defined as this Contract and all delivery/purchase orders, invoices or correspondence directly relating to this agreement.

ORDER CHANGES

Any changes to be made once an order has been provided to the Contractor must be made between the User and the Contractor. Both parties shall agree in writing to any changes in the scope of work and any increase or decrease in the price that may result as a consequence of the changes. **No order changes may be made verbally. Only the User has the right to issue a change to any order.**

SMALL BUSINESSES, WOMEN AND MINORITY-OWNED BUSINESSES

Where it is practicable for any portion of the awarded contract to be subcontracted to other suppliers, the contractor shall give full and fair consideration to small businesses, women and minority-owned businesses. When such business has been subcontracted to these firms, the contractor agrees to furnish the VITA Contract Administrator with quarterly reports that includes the following information: name of SWAM-owned subcontracted firm, contact name and phone number, total dollar amount subcontracted and type of product/service provided by the subcontracted firm.

CONTRACTOR MONTHLY REPORT OF SALES

The Contractor shall report the monthly dollar value, in U.S. dollars, of all sales under this Contract. VITA reserves the right to adjust the required reporting to monthly, should it so choose. The report shall also show an accumulative record of all sales which shall carry forward for the duration of the contract. The Contractor shall submit a monthly report of sales, signed, to the VITA Contract Administrator (to be named in the Contract) and the Controller, VITA, showing all contract sales to include name of individual entity, type of service and total dollar value purchased. A Contract sale is defined as the total of all invoices paid by the Commonwealth during the reported month. The dollar value of a sale is the price paid by the User for services under the contract as recorded by the Contractor

ASSIGNMENT OF CONTRACT

A Contract shall not be assignable by the Contractor in whole or in part without the written consent of the Commonwealth.

LIMITATION OF LIABILITY

To the maximum extent permitted by applicable law, the Contractor's liability under this contract for loss or damages to government property caused by the use of any defective or deficient product and/or services delivered under this Contract shall not exceed the greater of ***\$1,000,000 dollars or two times the total amount of the affected order to be paid to the Contractor resulting from a statement of work (SOW) under this contract as of the date of the event or circumstance giving rise to Contractor's liability.*** The Contractor will not be liable under this contract for any indirect, incidental, special or consequential damages, or damages from loss of profits, revenue, data or use of the supplies, equipment and/or services delivered under this contract. The above limitation of liability is per incident. The limitation and exclusion of damages in the foregoing sentences will not apply, however, to liability arising from: (a) personal injury or death; (b) defect or deficiency caused

by willful misconduct or negligence on the part of the contractor; or (c) circumstances where the contract expressly provides a right to damages, indemnification or reimbursement.

LIMITATION OF COST

It is hereby stipulated and agreed that the total cost to the Commonwealth for the performance of each Order will be within the "Not to Exceed" funding limitation set forth in the Order, and the Contractor agrees to perform the work specified and all obligations under the Order within such funding limitation. The Contractor agrees to notify the Commonwealth in writing no later than when the billable amounts reach eighty percent (80%) of the funding limitation and will include in such notification an estimate to complete the requirements of the Order.

The Commonwealth will not be obligated to reimburse the Contractor for billing in excess of appropriated funding up to the funding limitation set forth in the Order, and the Contractor shall not be obligated to continue performance of the Order or to incur costs in excess of the funding limitations unless and until a written amendment to the Order increasing the funding limitation is approved by the User.

PRICE ESCALATION/DE-ESCALATION

The Commonwealth, in its sole option, may permit price adjustments, for requested changes in the Contractor's cost of services using the Consumer Price Index/W (CPI-W) Table 4, Services/"Other Services" category as a guide, as found on website <http://STATS.BLS.GOV/NEWS.RELEASE/CPI.T04.HTM>.

Once the website is accessed, refer to the section titled COMMODITY AND SERVICE GROUP, within this group, refer to the lines titled SERVICES and OTHER SERVICES and read the figures in the fourth column for the current CPI rate.

Applicable price adjustment may also be allowed if the Commonwealth institutes an eVA transaction fee to be paid by Contractors effective July 1, 2003. No price increase will be authorized until twelve (12) months after the effective date of the contract, except for the afore mentioned 1% or \$500 maximum eVA transaction fee, and each twelve (12) months thereafter and only where verified to the satisfaction of the Commonwealth. Price increases allowed shall not be retroactive and shall only apply to new statements of work (SOW) or change orders impacting an existing SOW, upon approval of the User.

Contractor shall give not less than thirty (30) days advance written notice of any price increase to the Commonwealth. Any approved price changes will be effective only at the beginning of the calendar month following the

end of the full 30 day notification period. The Contractor shall document the amount and the proposed effective date of any general change in the price of services. Documentation shall be supplied with the Contractor's request for increase which will: 1) verify that the requested price increase is general in scope and not applicable just to the Commonwealth; and (2) verify the amount of percentage of increase which is being passed on to or by the Contractor and why the percentage of increase is necessary to supply services to the Commonwealth. The Contractor is further advised that decreases which affect the cost of services are required to be communicated and effective immediately to the Commonwealth.

AUDIT

The Contractor shall retain all books, records and other documents relative to this contract for three (3) years after final payment. The Virginia Information Technologies Agency, its authorized agents, and/or state auditors shall have full access to and the right to examine any materials, or the premises and processes of the Contractor and any Sub-contractors.

NON-APPROPRIATION

All funds for payment of equipment, software or services ordered under this Contract are subject to the availability of legislative appropriation for this purpose. In the event of non-appropriation of funds by the Legislature for the items under this Contract, the Commonwealth will terminate this Contract for those goods or services for which funds have not been appropriated. Written notice will be provided to the Contractor as soon as possible after legislative action is completed.

If any purchases are to be supported by federal funding, and such funding is not made available, the Commonwealth may terminate this Contract for goods or services dependent on such federal funds without further obligation.

ALTERNATIVE DISPUTE RESOLUTION

In accordance with Section 2.2-4363 of the Code of Virginia, Contractual claims, whether for money or other relief, shall be submitted in writing to the VITA no later than sixty (60) days after final payment; however, written notice of the Contractor's intention to file such claim must be given to VITA at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. VITA shall render a final decision in writing within thirty (30) days after its receipt of the Contractor's written claim.

The Contractor may not invoke any available administrative procedure under Section 2.2-4365 of the Code of Virginia nor institute legal action prior to receipt of the purchasing agency's decision on the claim, unless

that agency fails to render its decision within thirty (30) days. The decision of the purchasing agency shall be final and conclusive unless the Contractor, within six (6) months of the date of the final decision on the claim, invokes appropriate action under Section 2.2-4364, Code of Virginia or the administrative procedure authorized by Section 2.2-4365, Code of Virginia.

Contractor agrees to submit any and all contractual disputes arising from this contract to VITA's alternative dispute resolution procedures. Contractor may invoke VITA's alternative dispute resolution procedures at any time and concurrently with any other statutory remedies prescribed by the Code of Virginia.

In the event of any breach by the Commonwealth, Contractor's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section. In no event shall Contractor's remedies include the right to terminate any license or support services hereunder.

SECTION 508 COMPLIANCE

"All information technology which, pursuant to this Agreement, is purchased or upgraded by or for the use of any Commonwealth agency or institution or political subdivision of the Commonwealth (the "Technology") shall comply with Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended. If requested, the Contractor must provide a detailed explanation of how compliance with Section 508 of the Rehabilitation Act is achieved and a validation of concept demonstration. The requirements of this Paragraph along with the Non-Visual Access to Technology Clause shall be construed to achieve full compliance with the Information Technology Access Act, §§2.2-3500 through 2.2-3504 of the Code of Virginia."

NON-VISUAL ACCESS TO TECHNOLOGY:

All information technology which, pursuant to this Agreement, is purchased or upgraded by or for the use of any Commonwealth agency or institution or political subdivision of the Commonwealth (the "Technology") shall comply with the following non-visual access standards from the date of purchase or upgrade until the expiration of this Agreement:

(i) Effective, interactive control and use of the Technology shall be readily achievable by non-visual means;

(ii) The Technology equipped for non-visual access shall be compatible with information technology used by other individuals with whom any blind or visually impaired user of the Technology interacts;

(iii) Non-visual access technology shall be integrated into any networks used to share communications among employees, program participants or the public; and

(iv) The technology for non-visual access shall have the capability of providing equivalent access by non-visual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired.

Compliance with the foregoing non-visual access standards shall not be required if the head of the using agency, institution or political subdivision determines that (i) the Technology is not available with non-visual access because the essential elements of the Technology are visual and (ii) non-visual equivalence is not available.

Installation of hardware, software, or peripheral devices used for non-visual access is not required when the Technology is being used exclusively by individuals who are not blind or visually impaired, but applications programs and underlying operating systems (including the format of the data) used for the manipulation and presentation of information shall permit the installation and effective use of non-visual access software and peripheral devices.

If requested, the Contractor must provide a detailed explanation of how compliance with the foregoing non-visual access standards is achieved and a validation of concept demonstration.

The requirements of this Paragraph shall be construed to achieve full compliance with the Information Technology Access Act, 2.2-3500 through 2.2-3504 of the Code of Virginia.

CONTRACTOR ACCESS TO COMMONWEALTH LOCATION/S

Commonwealth shall grant to Contractor personnel such access to the Commonwealth location as may be necessary or appropriate for Contractor to perform its obligations under this Agreement, subject to all security issues. For any individual Commonwealth location, the Contractor may be required to undergo additional security procedures that may include but not be limited to; records verification, submission of photos and or fingerprints, etc. The Contractor may at any time, for any Commonwealth location, be required to undertake the execution and completion for each individual employee, the requirement of the submission of additional forms that the Commonwealth would consider

reasonable for security measures. These forms may include the individual employee's agreement that all Commonwealth information that is garnered while at the Commonwealth site is confidential and proprietary. Any unauthorized release of proprietary information by the Contractor or Contractor's employees shall constitute a breach of this Agreement.

TITLE

Title to equipment cleaned by Dyntek and shipped to a COVA Surplus Property warehouse remains with COVA. Title for equipment cleaned by Dyntek and placed in their warehouse (for donation, resale or recycling) is automatically transferred to Dyntek.

RISK OF LOSS OR DAMAGE

The Contractor shall have the risk of loss or damage wherein the equipment is removed from the customer's premises. Risk shall include intellectual property contained on the system(s)

PERIODIC PROGRESS REPORTS/INVOICES

For contracts requiring the submission of periodic contract performance progress reports or program status reports, the offeror will include a section on involvement of small businesses and businesses owned by women and minorities. This section will specify the actual dollars contracted to-date with such businesses, actual dollars expended to-date with such businesses and the total dollars planned to be contracted for with such businesses on this contract. This information shall be provided separately for small businesses, minority-owned businesses and women-owned businesses.

If the contract does not require the submission of periodic progress reports, the offeror will provide the above required information on actual involvement of small businesses and businesses owned by minorities and women as part of their periodic invoices.

FINAL ACTUAL INVOLVEMENT REPORT

The contractor will submit, prior to completion or at completion of the contract and subject to final payment, a report on the actual dollars spent with small businesses and businesses owned by women and minorities during the performance of the contract. At a minimum, this report shall include for each firm contracted with and for each such business class (i.e., small, minority-owned, women-owned) the total actual dollars spent on this contract, the planned involvement of the firm and business class as specified in the proposal, and the actual percent of the total estimated contract value.

WEB INTERFACE

Dyntek shall have the web interface in production within 90 days of the signing of this contract. This website will incorporate the functionality described through this contract document and the APM.

DONATION

Prior to making donations, a DynTek representative must contact Alvin Hatcher, Manager FSP, 804-236-3665, to confirm that the recipient is eligible to receive donations in accordance to Chapter 12.15 (APSPM) as outlined if not a public School. This requirement is not needed for donations to public schools.

DynTek further agrees to complete or ensure completion by the disposing agency, the **Donation Request: Computers and Related** form for any donations made to a local public body or qualified recipient and submit the completed form to the SSP (State Surplus Property) Manager on a monthly basis.

RECYCLING

Once delegated authority and registration (as described in the Procedures manual) have been received from the Department of General Services, no further delegation is needed.

RESALE

COVA/SSP (DGS Surplus Property) grants delegation to the User agency (and DynTek as defined in the Contract) to sell surplus computers and related equipment in the best interest of the COVA and on its behalf to the general public. Any guarantees made regarding the sale of any computer related property as to the condition of the property rests solely with DynTek. The COVA will not warrant or guarantee any item sold. Net proceeds are sent to the State Surplus Office as defined above under the declaration number provided by the owning agency and referenced on the DynTek payment documentation. Deposit of net proceeds will be completed as required by the CODE OF VIRGINIA. Agencies will be notified by Award, the current surplus process for non-auction sales.

SHIPMENTS TO RICHMOND OR WYTHEVILLE SSP WAREHOUSES

DynTek shall contact Cornelius Wyche, 804-236-2757, Richmond warehouse or Larry Blevins, 276-228-6803, Wytheville warehouse 10 business days prior to the expected delivery date to schedule delivery. Space can be very limited at both facilities. Scheduling the deliveries is critical to receiving of property. The current acceptance Standard is operable Pentium 2 and above. The VITA Standard tag must be affixed.

Alternatives may be suggested but must be approved by the Director of DGS Purchasing Services and Virginia Surplus Property Programs.

HANDLING OF FUNDS RECEIVED FROM RESALE

A. Agencies funded by General Fund: Dyntek will deduct its fixed operating costs, retain 30% of resale revenues, then will forward the remaining revenues to the Department of General Services' Surplus Property Division. Funds will be deposited by Surplus into the State Treasury, per Code of Virginia 2.2-1125.

B. Agencies not funded by the General Fund: Dyntek will deduct its cost, and then forward its remaining proceeds to the Department of General Services' Surplus Property Division. Surplus will forward proceeds to the User Agency.

C. Institutions and Localities: If purchase of equipment was funded by the State's General Fund, see "A" above. If it was not funded by the State's General Fund, refer to "B" above.

QUALIFIED DEVICES

The following is a list of technology devices that are accepted:

- Desktop Computers
- Mobile Computers
- Handheld Computers or PDA
- Servers
- Computer Monitors
- Terminals
- Printers
- Computer Attached Peripherals
- Network Electronics
- Magnetic Media
- Optical Media

EXCEPTIONS TO THE ABOVE LIST

DynTek will not handle any devices that are known to have been used in a nuclear, hazardous biological or hazardous chemical environment. These devices must be handled separately. Contact the Department of Environmental Quality for appropriate disposal guidelines.

**PERSONS SIGNING THIS CONTRACT ARE AUTHORIZED
REPRESENTATIVES OF EACH PARTY TO THIS CONTRACT AND
ACKNOWLEDGE THAT EACH PARTY AGREES TO BE BOUND BY
THE TERMS AND CONDITIONS OF THE CONTRACT.**

DYNTEK SERVICES, INC.

COMMONWEALTH OF VIRGINIA

BY: Wade Ste

BY: Philip L. Pippert

NAME: WADE STEVENSON

NAME: PHILIP L. PIPPERT

TITLE: VP FINANCE

TITLE: ASSOCIATE DIRECTOR

DATE: 9/28/04

DATE: 9/30/04